

1 **Kevin R. Martin, SBN 176853**

kmartin@randicklaw.com

2 **Brian M. O'Dea, SBN 45704**

bodea@randicklaw.com

3 **Patrick E. Guevara SBN 202727**

pguevara@randicklaw.com

4 **RANDICK O'DEA & TOOLIATOS, LLP**

5000 Hopyard Road, Suite 400

5 Pleasanton, California 94588

Telephone (925) 460-3700

6 Facsimile (925) 460-0969

7 Attorneys for Defendants, Counter Claimants and Third Party Claimants ROBERT E.
ESTUPINIAN, GINNY ESTUPINIAN and MUTUAL VISION, LLC, and Defendants and
8 Third Party Claimants MILLENNIUM REALTY GROUP, VESTA REVERSE 100, LLC,
VESTA CAPITAL ADVISORS, LLC, EDMUNDO ESTUPINIAN, and HAYDEE
9 ESTUPINIAN

10
11 **UNITED STATES DISTRICT COURT OF CALIFORNIA**

12 **NORTHERN DISTRICT OF CALIFORNIA**

13 **SAN JOSE DIVISION**

14 VESTA STRATEGIES, LLC,

15 Plaintiff,

16 vs.

17 ROBERT E. ESTUPINIAN, GINNY
ESTUPINIAN, MUTUAL VISION, LLC,
18 MILLENNIUM REALTY GROUP,
VESTA REVERSE 100, LLC, VESTA
19 CAPITAL ADVISORS, LLC, CAROL-
ANN TOGNAZZINI, EDMUNDO
20 ESTUPINIAN, and HAYDEE
ESTUPINIAN,

21 Defendants.

22
23
24
25 AND RELATED CROSS-ACTIONS.

Case No.: C 07-06216 JW RS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PLAINTIFF/COUNTER DEFENDANT
VESTA STRATEGIES, LLC'S MOTION TO
DISMISS; THIRD PARTY DEFENDANT
JOHN TERZAKIS' SPECIAL MOTION TO
STRIKE PURSUANT TO THE
CALIFORNIA ANTI-SLAPP STATUTE
AND FOR ATTORNEY'S FEES AND
COSTS; THIRD-PARTY DEFENDANT
JOHN TERZAKIS', SINGLE SITE
SOLUTIONS CORPORATION'S, AND B&B
SPARCO PROPERTIES, INC.'S MOTION
TO DISMISS OR STRIKE**

Date: May 5, 2008

Time: 9:00 a.m.

Dept: Room 8, 4th Floor, SJ

Judge: James Ware

26
27 Defendants, Counter Claimants and Third Party Claimants ROBERT E. ESTUPINIAN,
28 GINNY ESTUPINIAN and MUTUAL VISION, LLC, and Defendants and Third Party

1 Claimants MILLENNIUM REALTY GROUP, VESTA REVERSE 100, LLC, VESTA
 2 CAPITAL ADVISORS, LLC, EDMUNDO ESTUPINIAN, and HAYDEE ESTUPINIAN
 3 submit this Memorandum of Points and Authorities in Opposition to Plaintiff/Counter Defendant
 4 Vesta Strategies, LLC's Motion To Dismiss and Third Party Defendant John Terzakis' Special
 5 Motion To Strike Pursuant to the California Anti-Slapp Statute and for Attorney's Fees and
 6 Costs, and to Third-Party Defendant John Terzakis', Single Site Solutions Corporations, and
 7 B&B Sparco Properties, Inc.'s Motion To Dismiss or Strike.

8 ARGUMENT

9 **Plaintiff and Third-Party Defendants Motions Are Moot And Should Be Taken Off-** 10 **Calendar.**

11 Plaintiff and Third-Party Defendants' motion is moot and should be taken off calendar
 12 since Defendants, Counter claimants and Third Party Claimants have filed an amended pleading.
 13 Consequently, the issues raised in connection with the 12b(6) motions are no longer at issue.
 14 Each party has the right to amend its pleadings once "as a matter of course" (without prior leave
 15 of court) within a brief period after its original pleading is filed. FRCP 15(a); *Outdoor Systems,*
 16 *Inc. v. City of Mesa* (9th Cir. 1993) 997 F2d 604, 613. Likewise, third party complaints under
 17 FRCP 14 may be amended as a matter of right any time before a responsive pleading is served.
 18 Motions under Rule 12 (including motions to dismiss and motions to strike) are not "responsive
 19 pleadings" and therefore filing such motion does not bar plaintiff from thereafter amending the
 20 complaint once as a matter of right. *Crum v. Circus Circus Enterprises* (9th Cir. 2000) 231 F3d
 21 1129, 1130.

22 In this case, the respective Defendants, Counter claimants and Third Party Claimants
 23 filed and served their amended counterclaim and third party claims on April 9, 2008. Unless the
 24 court orders otherwise, the respective parties are required to respond to an amended pleading
 25 within the time remaining to respond to the original pleading or within 10 days after service of
 26 the amended pleading, whichever is later. FRCP 15(a)(3).

27 ///

28 ///

CONCLUSION

As a result of the amended pleadings, Plaintiff and Third-Party Defendants' motions are moot, and the hearing date should be taken off calendar.

Date: April 11, 2008

RANDICK O'DEA & TOOLIATOS, LLP

By: /s/
Kevin R. Martin